87-943

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF ST. LOUIS,
Petitioner,

vs.

JESSE WOODSON JAMISON,,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JAMES J. WILSON
City Counselor
*JULIAN L. BUSH
Assistant City Counselor
ELKIN L. KISTNER
Assistant City Counselor
314 City Hall
St. Louis, Missouri 63103
(314) 622-3361

Attorneys for Petitioner

*Counsel of Record

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

1. Is the interior of a municipal airport terminal a nonpublic forum if the consistent practice of the officials who operate the airport has been to deny all requests for permission to protest or solicit in the airport terminal and those officials have only allowed such protest or soliciation when so compelled by court order?

2. If the interior of a municipal airport terminal is a public forum, may the officials who operate the airport nevertheless prohibit a person who suffers from a manic-depressive mental disease that is associated with violent behavior and who has access to a firearm from protesting in the terminal at the mouth to one of its concourses?

PARTIES BELOW

The parties to the proceedings below were the petitioner City of St. Louis and Leonard L. Griggs, Jr., defendants and appellees/cross-appellants, and respondent Jesse Woodson Jamison, nee Wurm,* plaintiff and appellant/cross-appellee. Griggs served as the City's Director of Airports at the time of the events that gave rise to this lawsuit; because he no longer occupies that position, he does not join in this petition for a writ of certiorari.

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* Respondent initiated this lawsuit under the name Jesse Wurm. During the course of proceedings in District Court, Wurm obtained a Missouri state court order changing his name to Jesse Woodson Jamison. See the District Court Memorandum, reprinted in the Appendix hereto, p. A-14 n.1, *infra*.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties Below	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Constitutional Provisions, Statutes and Regulations	2
Statement of the Case	3
Reasons for Granting the Petition for A Writ of Certiorari	8
Conclusion	17
Appendix A (Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit, Order and Memorandum of the United States District Court for the Eastern District of Missouri, and Lambert Airport Solicitation Rule)	A-1

TABLE OF AUTHORITIES

Page

Cases cited:

Board of Airport Commissioners of the City of Los Angeles v. Jews For Jesus, Inc., 482 U.S. ____, 96 L.Ed.2d 50 (1987) 8,10,11

Chicago Area Military Project v. City of Chicago, 508 F.2d 921 (7th Cir.) 9

Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. ____, 87 L.Ed.2d 567 (1985). 10,12,13

Cox v. Louisiana, 379 U.S. 536 (1965) 13

Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981)..... 8,13

Jews For Jesus, Inc. v. Board of Airport Comm'rs, 785 F.2d 791 (9th Cir. 1986) 8

Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) 12,15

Minnesota Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984) 11

Perry Ed. Ass'n. v. Perry Local Educators' Ass'n. 460 U.S. 37 (1983) 11,12,13,14,15

Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) 15

United States v. Albertini, 472 U.S. 675 (1985) 12,15

United States Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760 (D.C. Cir. 1983)..... 8

Constitution, statutes and regulations cited:

U.S. Constitution, Amendment I 4

U.S. Constitution, Amendment XIV 4

18 U.S.C. §1542 3

42 U.S.C. §1983 4

United States Supreme Court Rule 17 9,10

Federal Rule of Civil Procedure 52(a) 15

Lambert-St. Louis International Airport Rule 1.05 (the Solicitation Rule) 5,6,14

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JESSE WOODSON JAMISON,,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Comes now the City of St. Louis, petitioner, and respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit filed in this case September 10, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit in this case is reported at 828 F.2d 1280, and is reprinted in the Appendix hereto, p. A-1, infra.

The memorandum, decision and order of United States District Court for the Eastern District of Missouri has not been reported. It is reprinted in the Appendix hereto, p. A-12, *infra.*

JURISDICTION

The judgment of the Court of Appeals was filed September 10, 1987. This Court has jurisdiction to review that judgment under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

U.S. Const., Amdt. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const., Amdt. XIV provides in pertinent part:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1 of the Civil Rights Act of 1871 (the "Ku Klux Klan Act"), 17 Stat. 13, 42 U.S.C. §1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

The text of Rule 1.05, the "Solicitation Rule" of the City of St. Louis Airport Commission, is set forth in the Appendix hereto, p. A-24, *infra*.

STATEMENT OF THE CASE

On April 16, 1984, Trans World Airlines ("TWA") discharged Jesse Jamison from his employment at Lambert-St. Louis International Airport ("Lambert Airport"), which is owned and operated by the City of St. Louis ("City"), due to Jamison's affliction with a serious mental illness. App. p. A-2, 15, *infra*,[1] Tr. 7,51.[2] While Jamison was a TWA employee, a federal grand jury indicted him under 18 U.S.C. §1542 for the offense of applying for a passport under a false name. No. 84-76 (CR) (E.D.Mo. April 19, 1984). The United States District Court for the Eastern District of Missouri dismissed that charge on May 31, 1984 because it determined that Jamison "could not appreciate the nature, quality and wrongfulness of the conduct charged in the indictment." App. p. A-16, *infra*.

After his discharge from TWA, Jamison sought permission from the Director of Lambert, Leonard L. Griggs, Jr., to protest against TWA in the Lambert Airport terminal, at the mouth of the terminal's busiest concourse. App. p. A-2, 15, *infra*; Tr. 65. In a letter to Jamison dated June 29, 1984, Griggs denied Jamison's request. That denial was entirely consistent with Griggs' unwavering practice of routinely denying all requests to protest or solicit in the Lambert Airport terminal. App. p. A-5, *infra*. The only persons permitted to protest or solicit with-

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[1] Hereinafter, references to the Appendix hereto shall be to "App."

[2] References herein to facts of record not fully documented by the opinion of the Court of Appeals or the Memorandum decision of the District Court (both of which are reprinted in the Appendix hereto), are to the transcript of the testimony adduced at trial. That transcript is part of the record in the Court of Appeals.

EDITOR'S NOTE

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in the Lambert Airport terminal belong to one of two groups which hold court orders compelling Griggs to allow their members to solicit there. Id. Moreover, Griggs' awareness that Jamison suffered from a severe psychological disorder, that he had been indicted for the federal offense of filing for a passport under a false name and that that indictment had been dismissed because a federal judge had concluded that Jamison was mentally incompetent to understand the nature, quality and wrongfulness of a criminal offense, convinced Griggs that to allow Jamison to protest in the Lambert Airport terminal would constitute a dereliction of Griggs' duty to protect the safety of the travelling public. App. at p. A- , infra.[3]

On March 7, 1985, Jamison filed the complaint initiating this lawsuit in the United States District Court for the Eastern District of Missouri. Jamison brought this civil rights action for declaratory and injunctive relief under 42 U.S.C. §1983 against Griggs and the City of St. Louis ("City"), claiming that the denial of his request to protest in the Lambert Airport terminal violated the freedom of speech rights he enjoys under the First and Fourteenth Amendments to the United States Constitution.

After a non-jury trial, the district court issued an order on July 17, 1986, declaring that the process by which the City and Griggs determined who may protest at Lambert Airport violates the First Amendment and enjoining them from utilizing that process in the future. The judgment, however, denied Jamison's request for an injunction requiring the City and Griggs to allow Jamison to protest in the Lambert Airport terminal App. p. A-12, *infra.*

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[3] Griggs testified at trial that various federal laws require airport operators to monitor and exercise caution concerning persons who exhibit unusual behavior patterns. Tr. 73. He also testified that Lambert Airport's security force would investigate any person loitering and behaving strangely in the terminal and would attempt to have him or her arrested by the local police and removed from the terminal if the person could not adequately explain his or her presence. Tr. 70.

In a memorandum accompanying its order, the district court noted the existence of a set of rules purportedly governing solicitation and protest at Lambert Airport ("Solicitation Rule"). App. p. A-15, *infra*. The district court found, however, that Griggs denied requests to protest and solicit at Lambert Airport as a matter of course without regard to the Solicitation Rule. The district court also assessed the results of a psychiatric evaluation of Jamison that it had ordered. App. p. A-10, n.7, *infra*. The court specifically found that "Jamison has a long history of psychiatric disorders. He has a manic depressive personality and suffers from severe mood swings, ranging from deep depression to unrealistic elation." App. at p. A-16. It further found that Jamison had access to a firearm, and that Griggs denied his request to protest at least partially because of his concern about Jamison's mental disorder. Id. The district court ultimately determined that Jamison was potentially dangerous. App. p. A-20, *infra*.

In its conclusions of law, the district court determined that the interior of Lambert Airport terminal is a public forum at which First Amendment activity, such as protest and solicitation, must be allowed.[4] App. p. A-17, *infra*. Based on its conclusion that the Lambert Airport terminal is a public forum, the district court held that Griggs' practice of independently denying protest and solicitation requests, without reference to the Solicitation Rule, violated the First Amendment.

The district court reasoned, however, that the foregoing conclusion did not necessarily compel the further conclusion that Jamison enjoys the right to protest in the Lambert Airport terminal. To the contrary, the district court explained that prohibiting Jamison from protesting in Lambert Airport is a reasonable time, place or manner restriction:

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[4] The district court apparently did not base its conclusion that the Lambert Airport terminal is a public forum on any evidence adduced at trial; rather, it merely opined that pubic places such as the terminal are ordinarily public fora. App. p. A-17, *infra*.

> The exclusion of mentally incompetent persons whose presence might pose a danger to others satisfies the requirement that the restriction be content neutral and intended to further a significant state interest. Airport officials have a legitimate interest, indeed a responsibility, to protect persons at airports from mentally ill people. Further, the exclusion of plaintiff from the airport leaves him other avenues of protest, albeit some not as efficacious as the course of action he proposes.

App. p. A-20-21, *infra*. The district court therefore held that "Jamison, due to his severe chronic manic/depressive condition, does not have the right to protest at Lambert [Airport]." Id.

Jamison appealed from that part of the district court judgment denying him personal injunctive relief; the City and Griggs cross-appealed from that part of the judgment holding that the interior of the Lambert Airport terminal is a pubic forum.

The Court of Appeals for the Eighth Circuit, in an opinion authored by Chief Judge Lay, affirmed the district court's ruling that the Lambert Airport terminal is a public forum and that the procedure employed by the City and Griggs for determining requests to protest or solicit in the terminal was unconstitutional. It reversed, however, that part of the district court judgment denying Jamison personal injunctive relief.

The Court of Appeals cited two factors in support of its conclusion that the Lambert Airport terminal is a public forum. First, it reasoned that the City's Solicitation Rule constituted an implicit acknowledgement of the compatibility of first amendment activities with the terminal's purposes, and deduced that the City had "effectively recognized the public forum status of the unrestricted areas of its airport." App. p. A-5-6, *infra*. Second, the Court of Appeals noted that "every court that has decided the issue has held that an airport is a public forum," App. p. A-6, *infra*, reciting the analysis commonly

employed in those decisions that likens the physical, commercial and unrestricted public access characteristics of an airport terminal to those of a "busy street." App. p. A-7, *infra.*

Having made the predicate determination that the Lambert Airport terminal is a public forum, the Court of Appeals concluded that Griggs' practice of excluding all protestors and solicitors, save those who carry a court order, from the interior of the terminal, was unconstitutional. The court believed that such a practice was unconstitutional because it vested excessive discretion in Griggs to determine the extent to which the public could use the interior of the Lambert Airport terminal as a First Amendment stage. Moreover, the court was unable to identify any governmental interest that would justify such a broad exclusion of protesting and soliciting in a public forum. App. p. A-8-9, *infra.*

As to its reversal of the district's denial of Jamison's request for personal injunctive relief, the Court of Appeals essentially disagreed with trial judge's factual finding that Jamison's mental disorder substantially and intolerably increased Jamison's propensity for dangerous conduct. App. p. A-9-10 & n.7, infra.[5] The court then held that Jamison's exclusion from the Lambert Airport terminal constituted an unlawful prior restraint, finding this Court's decision in *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) controlling. App. p. A-10.

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[5] Moreover, the Court of Appeals extrapolated from the district court's ruling that *Jamison's* exclusion from Lambert was a reasonable time, place and manner restriction a far broader holding: "The district court apparently endorsed a complete prohibition [to] preven[t] mentally incompetent persons from protesting at Lambert Field." App. p. A-9-10, & n.6, *infra.* The district court order and memoranda, however, are not susceptible to such a broad construction; to the contrary, the district court properly confined its focus to the question whether Jamison's individual and peculiar characteristics warranted his exclusion from the Lambert Airport terminal.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

This Court should grant this petition for a writ of certiorari because this case presents this Court with the opportunity to decide whether the terminal of a municipal airport constitutes a traditional public forum. That is one of the issues on which this Court granted certiorari in *Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. ____, 96 L.Ed.2d 50 (1987), but was unable to reach due to the substantial overbreadth of a regulation applicable to the airport in question that purported to control the exercise of First Amendment freedoms. This Court concluded that regardless of whether the central terminal of the Los Angeles International Airport ("LAX") was a public forum or a nonpublic forum, the regulation in question was unconstitutional because it "purports to create a virtual 'First Amendment Free Zone' at LAX," a ban that would be unconstitutional in even a nonpublic forum. Id., 482 U.S. at ____, 96 L.Ed.2d at 507-508. This case, however, squarely poses the issue of whether the interior of a municipal airport terminal is a public forum, and is free of any latent obstacle to this Court's resolution of that question.

Furthermore, the Eighth Circuit's conclusion in this case that the terminal of a governmentally owned and operated airport is a public forum places it in league with the Fifth, Seventh, Ninth and District of Columbia Circuits of the United States Court of Appeals; concededly, the result is that every circuit that has examined the question has held that airport terminals are public fora to which the public has a right of access solely for First Amendment activity purposes. *Jews for Jesus, Inc. v. Board of Airport Comm'rs*, 785 F.2d 791, 795 (9th Cir. 1986), aff'd on other grounds, 482 U.S. ____, 96 L.Ed.2d 500, 107 S.Ct. ____ (1987); *United States Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760 (D.C. Cir. 1983); *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981);

Chicago Area Military Project v. City of Chicago, 508 F.2d 921 (7th Cir.), *cert. denied,* 421 U.S. 992 (1975).

Thus, this is not an instance in which an unacceptable conflict among the circuits on an important matter "calls for an exercise of this Court's power of supervision." Supreme Court Rule 17.1(a). Instead, even more compelling reasons suggest that this Court should review on writ of certiorari the judgment of the Eighth Circuit in this case. The Fifth, Seventh, Ninth, District of Columbia, and now the Eighth, Circuits have decided that governmentally owned or operated airport terminals are public fora, an issue of critical importance not only to airport operators nationwide, but to the travelling public, which is increasingly dependent on the safe and efficient operation of airports for its transportation needs. The conclusion these courts of appeals have reached on this issue conflicts with several recent decisions by this Court. Those Supreme Court decisions confirm and elaborate upon governments' right to prohibit persons and groups from using public property as a First Amendment forum if the property in question lacks a traditional association with, and has not been dedicated to, assembly and debate.

More importantly, the Eighth Circuit's reasoning in reaching the conclusion that the Lambert Airport terminal is a public forum in substantially inconsistent with the mode of analysis this Court has fashioned in its decisions establishing the substance and countours of the public forum doctrine. Thus, the harm that the Eighth Circuits' decision in this case will cause is not confined to its precedential effect in future cases concerning the public's right to utilize governmental airport property for free speech activities; future litigants and courts may rely on its rationale to justify treating other governmental buildings as public fora even though those buildings are designed and used by their governmental owners or operators for purposes completely unrelated to First Amendment activities. In deciding whether to grant a writ of certiorari in this case, this Court

should also consider the profusion of lower federal court decisions upon which the Eighth Circuit relied in concluding that the Lambert Airport terminal is a public forum. Those decisions share the analytical infirmities that plague the Eighth Circuits's decision. Thus, what has evolved is a line of lower federal court decisions that blatantly disregard this Court's teachings on the public forum doctrine.

Rather than faithfully applying the principles that this Court has carefully crafted, the lower courts use one another's decisions as crutches to support the false proposition that airport terminals are public fora. A careful inspection of these cases reveals that the lower courts typically rationalize this result by parroting faulty reasoning contained in earlier decisions. The Eighth Circuit's decision below is archetypical of this problem. Thus, that decision threatens to add yet another stone to the growing wall of lower federal court case law that separates proper public forum doctrine treatment and the rapid judicially fueled conversion of our nation's airport terminals into protest and solicitation stages. The writ of certiorari this petition seeks should issue so that this Court may render an authoritative decision explaining the proper application of the public forum doctrine to the interiors of airport terminals and similar governmentally owned or operated facilities. Supreme Court Rule 17.1(c).

1. There Is No Basis, Factual Or Otherwise, To Support The Conclusion That The Terminal At Lambert Airport Is A Public Forum.

This Court has fashioned a forum analysis for reconciling the oftimes competing interests of the government in limiting the use of its property and that of those members of the public who wish to use that property for expressive activity. See, e.g., *Jews for Jesus, supra,* 96 L.Ed.2d at 506; *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. ____, 87 L.Ed.2d 567, 578 (1985). For the purpose of public forum

analysis, three discrete categories of fora exist: the traditional public forum; the public forum created by government designation; and the nonpublic forum. In a traditional public forum or a public forum by government designation, "the government may not prohibit all communicative activity." *Jews for Jesus, supra,* 96 L.Ed.2d at 506 (quoting *Perry Ed. Ass'n. v. Perry Local Educators' Ass'n.,* 460 U.S. 37, 45 (1983)). In a nonpublic forum, however, the government may preserve the property for its intended uses and may substantially restrict communicative activity. E.g., *Jews for Jesus, supra,* 96 L.Ed.2d at 506.

The Eighth Circuit's conclusion that the Lambert Airport terminal is a public forum lacks sound analytical moorings because that court failed to explain or even question whether the terminal acquired that status by virtue of tradition or government designation. That deficiency is underscored by the Eighth Circuit's complete failure to even note the distinction. To the minimal extent the Eighth Circuit analyzed the public forum issue, it seemed to mix the distinct factual inquiries that are appropriate for determining the existence of the two respective types of public fora, the traditional public forum and the public forum by government designation.[6] App., p. A-5-7, *infra.* The Eighth Circuit's omission to maintain this distinction is not merely academic, for it is one that is essential to the public forum doctrine. This petitioner respectfully suggests that the Eighth Circuit's failure to distinguish the two categories of

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[6] Logically, some factual findings are required to support a conclusion that government property has a long tradition of devotion to assembly and debate or that government property has been dedicated to assembly and debate. See *Minnesota Bd. for Community Colleges v. Knight,* 465 U.S. 271, 281 (1984) (absence of district court findings on these questions negates conclusion that public forum exists).

public fora substantially explains its incorrect conclusion that the Lambert Airport terminal is a public forum.[7]

The Record Is Barren Of Facts Indicating That The Lambert Airport Terminal Has A Long Tradition Of Devotion To Assembly And Debate.

The district court made no factual finding regarding the existence of a tradition of assembly and debate at the Lambert Airport terminal and, indeed, the record is barren of facts that would point to such a tradition.[8] Furthermore, it would be impossible to develop such a record because the Lambert Airport terminal (and airport terminals in general) quite simply lack the historical association with assembly and debate that is the lone element essential to the existence of a traditional public forum. *Perry Educ. Ass'n., supra,* 460 U.S. at 804.

This Court has never specifically identified as a traditional public forum any species of public property other than a park, street or sidewalk. See *Cornelius, supra,* 87 L.Ed.2d at 580; *Members of the City Council v. Taxpayers for Vincent,* 466

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[7] The fact that the Eighth Circuit would make this elementary error in public forum analysis dramatically highlights the need for authoritative guidance by this Court in this area.

[8] The Eighth Circuit's comparison of the Lambert Airport terminal to "a busy city street" perhaps suggests an unspoken characterization of the terminal as a traditional public forum. App. p. A-7. *infra.* The Eighth Circuit completely failed, however, to address whether the terminal was imbued with a tradition of assembly or debate; instead, it focused on a vague physical similarily between airport terminals and city streets, emphasizing the public nature of the property. *Id.* That analysis is irrelevant to the question whether the terminal is a traditional public forum. This Court has repeatedly denied that government property becomes a public forum merely by virtue of its accessibility to the public. See, e.g., *United States v. Albertini,* 472 U.S. 675, 686 (1985).

U.S. 789, 792-93 (1984). In stark contrast to parks, streets and sidewalks, which have a unique tradition as sites for assembly and debate, airport terminals have traditionally been devoted to one purpose only; i.e., to serve as a safe, efficient and pleasant nexus for air and ground modes of transportation. Therefore, the Lambert Airport terminal is not a traditional public forum.

The Record Does Not Support A Conclusion That The Lambert Airport Terminal Has Been Designated For Use As A Forum For Assembly And Debate.

This Court has stated quite plainly that government officials do not designate a public forum unless they have opened it "for indiscriminate use by the public" as a stage for communicative activity. *Perry Educ. Ass'n., supra,* 460 U.S. at 47. See also *Cornelius, supra,* 87 L.Ed.2d at 580 (government does not designate "a public forum by inaction or by permitting limited discourse, but only by *intentionally* opening a non-traditional forum for public discourse") (emphasis added). It is uncontrovertible that City officials have not designated the Lambert Airport terminal as a public forum. The Eighth Circuit specifically noted that the City has "refused *all* requests to protest or solicit except those accompanied by a court order." App. at p. A-5.

The Eighth Circuit pointed, however, to the fact that the Solicitation Rule at Lambert Airport had not been rescinded at the time Jamison sought to protest as indicating the City's recognition of Lambert Airport as a public forum. App. pp. A-4, 5-6, *infra.* The mere existence of the Solicitation Rule is nothing more than a false issue. The record shows that the City's actual policy and practice has been to resist every attempt to use the Lambert Airport terminal as a first amendment platform.[9] This is precisely the opposite of what is required for the

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[9] The relevant inquiry focuses not on the written rules regulating First Amendment activity, but on government's actual practice. See *Cox v. Louisiana,* 379 U.S. 536, 556-57 (1965).

designation of a public forum, *Perry Educ. Ass'n, supra,* 460 U.S. at 47.[10] Moreover, even if the initial effect of City officials' promulgation of the Solicitation Rule was to designate a public forum, the City closed that forum by adopting and implementing a policy of denying all protest and solicitation requests. *Id.* at 46.[11]

The confusion concerning the relevance of a "dead-letter" solicitation rule that the Eighth Circuit's decision will cause provides another compelling reason for this Court to grant certiorari here. This case will not only provide it the opportunity to determine whether an airport terminal may constitute a traditional public forum, but the circumstances under which government officials may have designated a terminal as a public forum.

2. The Court Of Appeals Improperly Overturned The District Court's Factual Finding That Jamison's Severe Mental Disorder Substantially And Intolerably Increases Jamison's Propensity For Dangerous Conduct. Even If The Lambert Airport Terminal Is A Public Forum, The District Court Correctly Concluded That Jamison's Exclusion From The Lambert Airport Terminal For Protest Purposes Is A Valid Time, Place And Manner Restriction.

Even if one assumes that the Lambert Airport terminal is a public forum, the City may still impose time, place and manner restrictions on expressive activities in the terminal. Such restrictions must be "content-neutral, . . . narrowly tailored to serve

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[10] This Court should recognize the practical reality that the Soliciation Rule was adopted only in the face of incorrect federal precedent holding airport terminals to be public fora.

[11] If the Lambert Airport terminal was neither a traditional public forum nor a public forum by designation, the City was free to exclude all protestors and solicitors from its confines, including Jamison. *Perry Educ, Ass'n., supra,* 460 U.S. at 46.

a significant government interest, and leave open ample alternative channels of communication." *Perry Educ. Ass'n., supra,* 460 U.S. at 45. The district court specifically found that Jamison suffered from a "severe chronic manic/depressive condition" and that his presence in the Lambert Airport terminal may pose a danger to the public. App. p. A-21, *infra.* The District Court properly concluded that prohibiting Jamison from protesting in the Lambert Airport terminal furthers the City's interest in protecting the safety of the travelling public. *Id.* p. A-21, *infra.* Moreover, the fact that such a restriction results in Jamison's complete exclusion from the forum in which he wishes to protest is constitutionally acceptable. *Taxpayers for Vincent, supra,* 466 U.S. at 790 (absolute prohibition of posting signs on public property is not overbroad because the prohibition must be complete to achieve its content-neutral purpose). See also *Albertini, supra,* 86 L.Ed.2d at 547. Here, Jamison's complete exclusion from the interior of the Lambert Airport terminal is necessary to adequately ensure the safety of the travelling public. It is likewise readily apparent that a prohibition based on Jamison's mental disorder and dangerous proclivities is entirely content neutral. Depriving Jamison of access to the interior of the Lambert Airport terminal works an insignificant impairment of his ability to broadcast his message. He could still, for example, hold his placard on the public sidewalks at the major exit and entrance points of the Lambert Airport terminal.

The Eighth Circuit disagreed with the district court's conclusion that Jamison's exclusion from protesting in the Lambert Airport terminal is a reasonable time, place and manner restriction. App. p. A-10, *infra.* Most particularly, it disregarded the district court's predicate finding that Jamison's mental disorder increased his potential for dangerous conduct.[12] It also con-

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[12] Despite its disregard of the district court's factual finding on this issue, the Eighth Circuit neglects to mention the clearly erroneous standard of review applicable to such findings. F.R.Civ.P. 52(a).

cluded that Jamison's exclusion constituted an unlawful prior restraint, finding controlling this Court's decision in *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969). app. p. A-10, *infra*. *Tinker*, however, is inapposite to the question whether the District Court was correct in concluding that Jamison's exclusion is a valid time, place and manner restriction, because that case addressed regulation of First Amendment conduct based on the content of the speech. *Id.*, 393 U.S. at 508-510.

This case therefore provides this Court with a unique opportunity. It first presents the question whether, or under what circumstances, a governmentally owned or operated airport terminal is a public forum. Assuming that this Court would agree with the Eighth Circuit that the Lambert Airport terminal is a public forum, it then raises questions concerning the extent to which airport officials may act to protect the safety of the travelling public by excluding protestors or solicitors whose individual characteristics, independent of the nature of their messages, unacceptably increase their propensities for dangerous conduct. These questions are significant and have not been adequately analyzed or resolved by the lower federal courts. The need for an authoritative decision by this Court in this area is compelling.

CONCLUSION

For the foregoing reasons, this Court should issue the writ of certiorari this petition seeks.

Respectfully submitted,

JAMES J. WILSON,
City Counselor
*JULIAN L. BUSH
Assistant City Counselor
ELKIN L. KISTNER
Assistant City Counselor
314 City Hall
St. Louis, MO 63103
622-3361

Attorneys for Petitioner

*Counsel of Record

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2007

Jesse Woodson Jamison,
Appellant,

v.

City of St. Louis;
Leonard L. Griggs, Jr.,
Appellees.

No. 86-2249

Jesse Woodson Jamison,
Appellee,

v.

City of St. Louis and
Leonard L. Griggs, Jr.,
Appellants.

Appeals from the United States
District Court for the
Eastern District of Missouri.

Submitted: April 17, 1987

Filed: September 10, 1987

Before LAY, Chief Judge, WOLLMAN, Circuit Judge, and BOGUE,* Senior District Judge.

LAY, Chief Judge.

These cross-appeals arise out of an action brought by Jesse Woodson Jamison against the City of St. Louis (City) and the director of the City's airport. Jamison claimed that his first amendment rights were violated when the airport director refused Jamison's request to protest silently in an unsecured area of the airport. The district court[1] held that the process by which the defendants determine who may protest at the airport is unconstitutional, in violation of the first and fourteenth amendments. The court nevertheless upheld the alleged right of the defendants to bar Jamison from protesting silently at the airport. The court awarded Jamison half of the attorney's fees he requested. We affirm the order declaring the defendants' practices unconstitutional and reverse the ruling that exclusion of the plaintiff was constitutional; we hold that plaintiff is the prevailing party and is entitled to full attorney's fees.

Background

Jamison was employed by Trans World Airlines (TWA) for sixteen years, until he was fired on April 16, 1984. Jamison, who suffers from depression, believes that his discharge was discriminatorily based on his mental illness. After he was fired, Jamison informed Colonel Leonard G. Griggs, Jr., director of the city-owned Lambert-St. Louis International Airport, that he wished to protest TWA's action by standing in an unsecured

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*The HONORABLE ANDREW W. BOGUE, Senior United States District Judge for the District of South Dakota, sitting by designation.

[1] The Honorable Stephen Limbaugh, United States District Judge for the Eastern District of Missouri, presiding.

spot on an airport concourse with a sign reading "TWA discriminates against the handicapped." Griggs orally indicated that he would deny Jamison's request. Jamison then submitted a written request to the same effect, emphasizing the intended peaceful nature of the protest.[2] Griggs denied the request in writing without stating his reasons for doing so.[3]

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[2] The full text of this letter reads as follows:

> Dear Colonel Griggs,
>
> This is a formal request for written permission to protest my discriminatory discharge from employment with Trans World Airlines. I would like to picket at the foot of concourse C, near the glass wall, to be sure that I do not obstruct any passenger traffic, which I assure you is not my intention. I also do not intend to solicit funds, distribute literature, willfully engage passengers in conversation, or cause any disturbance what-soever. I only desire to remain in a stationary position with a poster in my hand, and in doing so exercise my First Amendment right to freedom of speech.
>
> Your prompt written reply to this request would be appreciated.
>
> Very truly yours,
>
> /s/ Jesse Wurm

[3] Griggs testified that he performed a brief investigation into Jamison's background before denying the request. According to Griggs, the following was "his reason and basis" for his decision.

> The information that I gleaned from talking to TWA security people, from various other people involved in the TWA investigation, whose name I do not remember. I'm talking to the TWA station manager and the evidence presented to me that here we had a former TWA employee who had a known mental disorder, and I use the word because I don't know the lay word to use — the depression and that. You all have stated in the record the name of it. Based upon the fact that I had talked to Mr. [Jamison] in my office on several occasions and told him that — you know — based upon these sorts of things, I did not desire to hurt Mr. [Jamison], but I felt I had to protect the travelling public. Here I have before me a gentleman. He has filed a passport for the United States of America under a false name, who went before a Federal Court and was ordered to have a psychiatric evaluation. All these things were told to me, so based upon this, I felt the public could be placed in jeopardy.

At the time of Jamison's request, the Airport Authority had a rule that established "procedures for the exercise of constitutional freedoms and solicitation of funds" at the airport. Rule 1.05 states that persons or organizations desiring to exercise constitutional freedoms "*shall be protected in such activities,* provided that the same do not constitute commercial activities and do not result in interference with transportation functions of the Airport." (Our emphasis). The second section of the same rule stated that the rule and its accompanying regulations were intended "[t]o insure that persons seeking to exercise constitutional freedoms of expression can communicate effectively with users of the Airport."

The rule further provided that

> No person shall solicit alms or contributions of money or of other articles of value, for religious, charitable or any other purpose, or conduct or participate in any speech-making, distributing of pamphlets, books or other written or graphic materials upon the airport or within its facilities without having delivered a written notice to the Director, or [sic] his, her or its intent to do so at least seven (7) days prior thereto so that the precautions to protect the public health, safety and order, and to assure the efficient and orderly use of Airport property for its primary purpose and function, and to assure equal opportunity for the freedom of expression of others.

Finally, the rule states that

> The Director is empowered to wholly or partically restrict the activities provided for herein in the event of emergencies, including but not limited to, strikes affecting the operation of the Airport, aircraft or traffic accidents, riots or civil commotion, power failures, or other conditions tending to disrupt the normal operations of the Airport.

The defendants assert that Solicitation Rule 1.05, although it had not been repealed, was "moribund" at the time of

Jamison's request. Griggs testified that he did not apply the rule in denying Jamison's request. Instead, Griggs testified that as director of the airport he had general discretion to disallow any activities that in his opinion would not be in the best interests of the airport or persons using it. Grigg's unvarying practice was to deny *all* requests for permission to protest or solicit except those accompanied by a court order.

The district court held that this procedure violates the first amendment because it gives Griggs unlimited and standardless discretion to determine who may protest or solicit at the airport. The court nevertheless found that Grigg's refusal to allow Jamison to protest silently was a legitimate time, place, and manner restriction, reasonably designed to protect the public from a "mentally incompetent" person.

Discussion

I. Constitutionality of Airport's Practice

Although the government does have the "power to preserve the property under its control for the use to which it is lawfully dedicated," *Greer v. Sprock,* 424 U.S. 828, 836, (1976) (quoting *Adderley v. Florida,* 385 U.S. 39, 47 (1966)), the extent to which the government may limit public access to its property depends on whether the property is a public or nonpublic forum. *Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788, 797 (1985); Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 44 (1983). The district court found that the area of the airport at which Jamison wished to protest is a " 'public place' which, ordinarily, means it is a 'public forum,' where citizens may express their views." *Jamison v. City of St. Louis,* No. 85-536-C(5), slip op. at 4 (E.D. Mo. 1986). We agree that in these circumstances the public areas of a municipal airport constitute a public forum.

We base our decision on several factors. First, and most importantly, the City of St. Louis, through its solicitation rule, ef-

fectively recognized the public forum status of the unrestricted areas of the airport. Its regulations, designed to "insure that persons seeking to exercise constitutional freedoms of expression can communicate effectively with users of the airport," stated that such persons *"shall be protected"* in their activities. (Our emphasis). The City's regulations thus implicitly acknowledged that the first amendment activities that take place in more traditional public forums are not incompatible with the purposes of an airport's public concourses. *Cf. Grayned v. City of Rockford,* 408 U.S. 104, 116 (1972) ("crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place * * *").

Second, every court that has decided the issue has held that an airport is a public forum. *See Jews for Jesus, Inc. v. Board of Airport Comm'rs,* 785 F.2d 191, 795 (9th Cir. 1986), *aff'd on other grounds,* 107 S.Ct. 2568 (1987); *US Southwest Africa/Namibia Trade & Cultural Council v. United States,* 708 F.2d 760, 764-66 (D.C. Cir. 1983); *Fernandes v. Limmer,* 663 F.2d 619, 626-27 (5th Cir. 1981); *Chicago Area Military Project v. City of Chicago,* 508 F.2d 921, 926 (7th Cir.), *cert. denied,* 421 U.S. 992 (1975); *Kuszynski v. City of Oakland,* 479 F.2d 1130, 1131 (9th Cir. 1973); *International Society of Krishna Consciousness v. Wolke,* 453 F.Supp. 869, 872 (E.D. Wisc. 1978); *International Society for Krishna Consciousness v. Griffin,* 437 F.Supp. 666, 672-73 (W.D. Pa. 1977); *International Society for Krishna Consciousness v. Rochford,* 425 F.Supp. 734, 742 (N.D. Ill. 1977), *aff'd in part, rev'd in part,* 585 F.2d 263 (7th Cir. 1978); *International Society of Krishna Consciousness v, Engelhardt,* 425 F.Supp. 176, 180 (W.D. Mo. 1977); *cf. Wolin v. Port of New York Authority,* 392 F.2d 83, 90 (2d Cir.) (large bus station is public forum), *cert. denied,* 393

U.S. 940 (1986).[4] We agree with these courts and with the City's implicit acknowledgment that the concourse of a large airport facility like the one in St. Louis has the character, pattern of activity, and nature of purpose that makes it an appropriate place for the communication of views. *See Wolin,* 392 F.2d at 89. As has been noted, an airport terminal is much like a busy city street. Both are lined by shops, restaurants, newsstands, and other businesses, with travelers or other members of the general public coming and going as they please. No security checkpoint must be crossed to reach the area where Jamison proposed to stand, nor must a fee be paid to enter that area. These facts, coupled with the City's Rule 1.5, publicly designating the airport as an arena where first amendment rights would be protected, lead us to conclude that the concourses of Lambert Airport are a public forum.

As the Supreme Court has repeatedly stated, "speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.,* 473 U.S. 788, 800 (1985). The defendants' procedure for determining who may exercise first amendment rights at the airport is, therefore, constitutionally defective in two respects.

First, in practice and in contravention of its own regulations, the City gives airport director Griggs complete and unguided

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[4] The Supreme Court recently bypassed the question of whether a municipal airport is a public forum. *See Board of Airport Comm'rs v. Jews for Jesus, Inc.,* 107 S.Ct. 2568, 2571 (1987) (finding Los Angeles International Airport policy banning all first amendment activity in portion of terminal unconstitutionally overboard whether forum was public or nonpublic). The *Jews for Jesus* Court found it unnecessary to decide the question because the Airport Commissioner's resolution at issue prohibited *all* first amendment activities and thus was unconstitutionally overboard regardless of the proper standard. *Id.* at 2573.

discretion to rule on applications to exercise first amendment rights. As the district court noted, such a practice which

> makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official — as by requiring a permit or license which may be granted or withheld in the discretion of such official — is an unconstitutional censorship of prior restraint upon the enjoyment of those freedoms.

Staub v. City of Baxley, 355 U.S. 313, 322 (1958); *cf. Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 107 S.Ct. 2568, 2573 (1987) (rejecting proposed narrowing construction of ordinance that prohibited all first amendment activities in airport because proposed construction — prohibiting only non-airport related speech — would give airport officials the unconstitutional power "to decide in the first instance whether a given act is airport related.") The Supreme Court has consistently invalidated such practices, in recognition of the immeasurable injury inflicted on first amendment freedoms by the potentially arbitrary and discriminatory exercise of an official's unfettered discretion.[5]

Moreover, the City's practice is not narrowly tailored to serve compelling interests because, as Griggs testified, he routinely refused *all* requests to protest or solicit except thsoe accompanied by court order. Appellees have failed to justify this prac-

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[5] *See, e.g., Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-53 (1969) (reversing conviction based on ordinance that gave City Commission unbridled authority to issue or withhold parade permits without reference to legitimate regulation of streets or sidewalks); Saia v. New York*, 334 U.S. 558, 559-60 (1948) (ordinance that prohibited loudspeaker use in public places without permission of police chief with unlimited discretion held unconstitutional); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (reversing conviction based on ordinance that required license to distribute religious literature, with no standards for the exercise of licensing discretion).

tice, and we can discern no compelling government need that would warrant such a drastic exclusion of speakers from a public forum. We therefore affirm the district court's finding that the procedure by which the City and Griggs determine who may exercise first amendment rights at the Lambert Airport is unconstitutional, in violation of the first and fourteenth amendments.

II. Denial of Jamison's Request to Protest Silently

Although the district court declared the defendants' protest policy unconstitutional, it nevertheless upheld the denial of Jamison's request as a reasonable time, place, and manner restriction.

The government may regulate the time, place, and manner of expression in public forums as long as its regulations are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983). The district court held that the defendants' refusal to allow Jamison to protest because of his "mental afflictions" satisfied these criteria:

> The exclusion of mentally incompetent persons whose presence might pose a danger to others satisfies the requirement that the restriction be content neutral and intended to further a significant state interest. Airport officials have a legitimate interest, indeed a responsibility, to protect persons at airports from mentally ill people. Further, the exclusion of plaintiff from the airport leaves him other avenues of protest, albeit some not as efficacious as the course of action he proposes.

Jamison v. City of St. Louis, No. 85-536-C(5), slip op. at 7 (E.D. Mo. 1986).

We disagree with the district court's reasoning and conclusion. It is true, as the City urges, that the airport authorities

have legitimate interests in "security and operational efficiency." It is also true that Jamison has been diagnosed as manic-depressive. The City has utterly failed to demonstrate, however, how excluding all persons suffering from some form of mental illness will further the City's interests in security and operational efficiency.

The City argues that certain persons, including Jamison, have mental illnesses "which increase their propensity for violent or disruptive conduct," and that barring these persons will further their goals of security and operational efficiency. Yet a broad assertion that *some* manic-depressive persons may be prone to violence cannot justify depriving *all* mentally ill persons of their first amendment rights.[6] No did the evidence demonstrate that Jamison would in fact pose a danger to the public.[7]

We find the Supreme Court's language from *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969), applicable here: "[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508; *see also Fernandes v. Limmer,* 663

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[6] The district court apparently endorsed a complete "prohibition [to] prevent[t] mentally incompetent persons from protesting at Lambert Field." Slip op. at 7. We reject such an overbroad and constitutionally offensive prohibition. We note, however, that we are not faced with and therefore need not address the constitutionality of an ordinance or regulation that is narrowly tailored to protect the public from those people who actually present sustantial threats to safety.

[7] Dr. Jerold J. Kreisman, appointed by the court to conduct a psychiatric evaluation of Jamison, concluded that

> although by virtue of his illness there is a potential in some circumstances, for violence, at this time and under usual circumstances I do not believe that Mr. [Jamison] poses an imminent danger to himself or to other people, nor would such circumstances likely arise during controlled and orderly peaceful protest.

F.2d 619, 628 (5th Cir. 1981) ("Punishment for criminal behavior must be government's response to an abuse of the privilege to use a public forum; prospective restraints are unconstitutional.").

Although we thus reject the lower court's ruling on the constitutionality of the defendants' exclusion of Jamison, we agree that it is unnecessary for the court to issue an injunction directing the City to allow Jamison to protest silently. Rather, on remand the district court should fashion an appropriate order declaring the parties' rights, in accordance with this opinion. Upon further violation of plaintiff's rights, if such were to occur, plaintiff is free to renew his request for an injuction to allow him the right of peaceful picketing.

III. Attorneys' Fees

Jamison has succeeded both on his claim that the defendants' procedure is unconstitutional and on his claim that the defendants' exclusion of him from the airport is unconstitutional. Jamison should reapply for an award for full attorney's fees.

IV. Conclusion

We affirm the district court's ruling that the defendants procedure is unconstitutional. We reverse the ruling with respect to the defendants' exclusion of Jamison and remand for entry of an order declaring the parties' rights, in accordance with this opinion. Plaintiff shall recover costs from the City.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2007/2249EM

Jesse Woodson Jamison,
Appellant/Cross-Appellee,

v.

City of St. Louis and
Leonard L. Griggs, Jr.,
Appellees/Cross-Appellants.

Appeals from the United States
District Court for the
Eastern District of Missouri.

JUDGMENT

Filed:
September 10, 1987

These appeals from the United States District Court were submitted on the record of the said district court, briefs of the parties and were argued by counsel.

Upon consideration of the premises, it is hereby adjudged and decreed that the judgment of the district court is affirmed in part, reversed in part and the cause remanded for further proceedings consistent with the opinion of this Court.

Plaintiff shall recover costs from the City.

September 10, 1987

Order entered in accordance with opinion.

Robert D. St. Vrain
Clerk, U.S. Court of Appeals, 8th Circuit.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 85-536 C (5)

Jesse Woodson Jamison,
Plaintiff,

vs.

City of St. Louis, et al.,
Defendants.

ORDER

FILED
July 17, 1986

In accordance with the Memorandum filed today,

IT IS HEREBY ORDERED that judgment is entered on the merits in favor of defendants Leonard L. Griggs and the City of St. Louis, Missouri, and against plaintiff Jesse Woodson Jamison on plaintiff's application for an injunction requiring defendants to allow him to protest at St. Louis Lambert Field International Airport.

IT IS FURTHER ORDERED that judgment is entered on the merits in favor of plaintiff Jesse Woodson Jamison and against defendants Leonard L. Griggs and the City of St. Louis on plaintiff's application for a declaratory judgment.

IT IS FURTHER ORDERED AND DECLARED that the process by which defendants determine who may protest at St. Louis Lambert Field International Airport is unconstitutional in violation of the Free Speech Clause of the First and Fourteenth Amendments to the United States Constitution.

IT IS FURTHER ORDERED that defendants are permanently enjoined from determining whether persons may protest at Lambert Field through a process in which one person has sole, unlimited discretion to grant or deny applications.

Dated this 17th day of July, 1986.

Stephen Limbaugh

United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 85-536 C (5)

Jesse Woodson Jamison,
Plaintiff,

vs.

City of St. Louis, et al.,
Defendants.

MEMORANDUM

FILED
July 17, 1986

Plaintiff Jesse Woodson Jamison[1] has brought this civil rights action against defendants Col. Leonard L. Griggs and the City of St. Louis, Missouri. He contends that defendants have violated his First Amendment rights of freedeom of speech by denying his request for permission to protest against Trans World Airlines (TWA) at St. Louis Lambert Field International Airport. Col. Griggs is the Director of Lambert Field, and the City of St. Louis owns the facility. Plaintiff seeks an injunction directing defendants to allow him to protest at the airport facility, and a declaration that the method by which Col. Griggs determines who may protest violates the First and Fourteenth Amendments. The defendants have answered plaintiff's complaint with general denials and contend, affirmatively, that Jamison poses a "clear and present danger" to passengers and employees at Lambert Field.

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[1] Plaintiff originally filed suit under the name of Jesse Wurm. He changed his name to Jesse Woodson Jamison by order of the Circuit Court for the City of St. Louis, Missouri, dated August 7, 1985. The Court allowed plaintiff, at trial, to amend his complaint by interlineation to reflect this change.

The parties tried this cause to the Court on March 20, 1986. This Memorandum constitutes the Court's findings of fact and conclusions of law for purposes of Fed.R.Civ.P. 52(a).

Findings of Fact

After TWA discharged its former employee, plaintiff Jesse Jamison, from his employment at Lambert Field on June 22, 1984, he applied to Col. Griggs, the airport's Director, for premission to protest against the airline. Jamison's application letter to Griggs reads, in pertinent part,

> This is a formal request for written permission to protest my discriminatory discharge from employment with Trans World Airlines. I would like to picket at the foot of concourse C, near the glass wall, to be sure that I do not obstruct any passenger traffic, which I assure you is not my intention. I also do not intend to solicit funds, distribute literature, willfully engage passengers in conversation, or cause any disturbance what-so-ever (sic). I only desire to remain in a stationary position with a poster in my hand, and in doing so exercise my First Amendment right to freedom of speech.

Plaintiff planned to stand near a well-traveled portion of the airport's main terminal and hold a sign that reads "TWA DISCRIMINATES AGAINST THE HANDICAPPED."

On June 29, 1984, Col. Griggs denied Jamison's request, noting in a letter to plaintiff, "Under the circumstances at this airport, I respectfully deny your request." Col. Griggs did not purport to base his refusal on the rules governing soliciation at Lambert Field.[2] The soliciation rules establish a procedure by which a person can apply to protest at the airport, and set limits on where and when these protests can occur. Despite the apparently applicability of the solicitation rules, Col. Griggs

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[2] See appendix.

testified at trial that he exercises total discretion in deciding whether someone may protest at Lambert Field. He usually denies these requests as a matter of course, without consulting the pertinent portions of the rules.

Col. Griggs testified in a straight forward manner about the reasons for his denial of plaintiff's application to protest. He denied plaintiff's application because he disagreed with the message plaintiff wanted to convey, and because he believed that plaintiff has severe psychological problems. While Jamison was a TWA employee, a federal grand jury indicted him for applying for a passport under a false name, a criminal offense under 18 U.S.C. §1542.[3] However, the Honorable Clyde S. Cahill, United States District Judge for the Eastern District of Missouri, determined on May 31, 1984, that Jamison "could not appreciate the nature, quality and wrongfulness of the conduct charged in the indictment," and dismissed the criminal charge. Col. Griggs knew that a federal district court had determined that plaintiff had a mental disorder, and based the decision to deny his request at least partially on this information.

Jamison has a long history of psychiatric disorders. He has a manic/depressive personality and suffers from severe mood swings, ranging from deep depression to unrealistic elation. Dr. Jerold Kreisman, a psychiatrist, examined plaintiff on February 21, 1986. He determined that Jamison does not necessarily pose a danger to other people, but confirmed the continuing presence of plaintiff's wide mood swings. Plaintiff believes that Col. Griggs has been harassing him over the phone, a claim that Griggs credibly denied at trial. Plaintiff has access to a firearm, although he claims he never takes the weapon outside his home.

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[3] No. 84-76 (CR) (E.D. Mo. April 19, 1984).

Conclusions of Law

The Court has jurisdiction of this federal civil rights action pursuant to 28 U.S.C. §§1331 and 1343(3), and 42 U.S.C. §1983. Venue is proper in the Eastern District of Missouri. 28 U.S.C. §1391(b).

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." The Free Speech Clause applies to the states and their subdivisions through incorporation in the Due Process Clause of the Fourteenth Amendment. *United Mine Workers v. Illinois Bar Ass'n.,* 398 U.S. 217, 221-22 n. 4 (1967), *citing, New York Times Co. v. Sullivan,* 376 U.S. 254, 276-77 (1964). The area at Lambert Field where Jamison would like to protest is a "public place" which, ordinarily, means it is a "public forum," where citizens may express their views. *United States v. Grace,* 103 S.Ct. 1702, 1706-08 (1983); *see also International Society for Krishna Consciousness v. Engelhardt,* 425 F.Supp. 176, 180 (W.D. Mo. 1977) (public area at airport is a public forum).

Under the principles of *Monell v. Dept. of Social Services of the City of New York,* 436 U.S. 658 (1978) and progeny, the City of St. Louis must bear legal responsibility for Col. Griggs' actions. Col. Griggs is a high-ranking city employee and the method by which he considers applications to protest has become city policy. *Id.* at 694.

Col. Griggs alone decides when a person may protest at Lambert Field. When making these decisions, he follows his own judgment, and does not look to any objective criteria. He completely ignores the standards enunciated in the solicitation rules. Consequently, the Court must determine the constitutionality of the actual procedure Col. Griggs uses when considering applications to protest, and not the constitutionality of the solicitation rules as written. *See Cox v. Louisiana,* 379 U.S. 536, 556-57 (1965); and *Niemotko v. Maryland,* 340 U.S. 268, 271-72 (1951).

A system in which an official has complete discretion to grant or deny applications to protest in a public forum violates the First and Fourteenth Amendments to the United States Constitution.

> [A policy which] makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official — as by requiring a permit or license which may be granted or withheld in the discretion of such official — is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Straub v. Baxley, 355 U.S. 313, 322 (1957) (bracketed material added); *see also Shuttlesworth v. Birmingham,* 394 U.S. 147, 150-51 (1969); *Cox,* 379 U.S. at 556-68; *Kunz v. New York,* 340 U.S. 290, 293-94 (1951); *Niemotko,* 340 U.S. at 272; and *Schneider v. State,* 308 U.S. 147, 161-62 (1939).

The United States District Court for the Western District of Missouri considered a similar situation in *International Society for Krishna Consciousness v. Engelhardt.* There, Judge Hunter declared unconstitutional a Kansas City, Missouri, ordinance that limited the ability of persons to protest at that city's airport, finding that "it prescibes no standards to limit the unbridled discretion of the licensing authority." 425 F.Supp. at 180. Like the unconstitutional ordinance in *Engelhardt,* the system by which persons must apply to Col. Griggs for permission to protest allows for no limitation on his discretion and is similarly defective.

In addition, in denying plaintiff Jamison's application to protest, Col. Griggs based his decision, in part, on his belief that, contrary to the message plaintiff wants to convey, TWA does not discriminate against the handicapped. But, the Constitution does not permit the state to deny a request to protest because the licensing agent disagrees with the message a protester seeks to communicate. "The right to equal protection of

the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims of personal opinions of a local governing body." *Niemotko,* 340 U.S. at 272.

The method by which Col. Griggs determines who can protest, then, violates the First and Fourteenth Amendments. But, whether plaintiff has a right to protest at Lambert Field raises additional questions, relating principally to the constitutional sufficiency of defendants' affirmative defense. They contend that plaintiff poses a "clear and present danger" to passengers and employees at Lambert Field and that, consequently, he has no right to protest at the facility.

The phrase "clear and present danger" generally applies to situations where the content of speech endangers the personal safety of persons in the vicinity of the speaker or inhibits a legitimate state goal and, as a result, justifies certain limitations. *See e.g. Bond v. Floyd,* 385 U.S. 116, 137 (1966); *Watts v. U.S.,* 394 U.S. 705, 706-08 (1969) (per curiam); and *Brandenburg v. Ohio,* 395 U.S. 44, 446 (1969) (per curiam). The defendants want to preclude Jamison from protesting at Lambert Field because his presence, rather than the content of his speech, endangers others. They have improperly labeled the defense they assert, since the danger they cite does not concern the content of Jamison's proposed message. Instead, the Court must determine whether the existence of Jamison's serious mental impairment represents a constitutionally sufficient reason for excluding him from the facility.

By denying Jamison's application to protest, defendants seek to regulate conduct, his presence at the airport, and this regulation necessarily has an effect on his ability to express his views in that forum. In *Clark v. Community for Creative Non-Violence,* 104 S.Ct. 3065 (1984), the Supreme Court upheld the constitutionality of National Park Service regulations prohibiting people from camping in Lafayette Park across from the White

House. The persons who challenged the regulations sought permission to camp in Lafayette Park in order to protest President Reagan's economic policies. The challenged regulations authorize protesters to erect tent cities in the park, but do not allow them to actually camp there.

The Supreme Court found this limitation permissible either as a reasonable time, place or manner restriction, or as a valid regulation of symbolic conduct. *Id.* at 3069. The latter ground has no applicability here since Jamison does not wish to express his message merely by appearing at Lambert Field. Consequently, the standards enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968), the seminal case in the area of regulation of expressive conduct, have no relevance. In *O'Brien*, the Court considered the constitutionality of regulations prohibiting the burning of draft cards. The challenged restriction regulated conduct which itself was the intended message. Here, the regulated conduct, presence, is not the message plaintiff wants to convey.

The Court must determine whether defendants' refusal to allow Jamison to protest because of his mental afflictions is a reasonable time, place or manner restriction.

> Expression, whether oral or written or symbolized by conduct is subject to reasonable time, place and manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open amply alternative channels for communication of the information.

Clark, 104 S.Ct. at 3069; *City Council v. Taxpayers for Vincent*, 104 S.Ct. 2118, 2130 (1984); and *Grace*, 103 S.Ct. at 1708-10. The exclusion of mentally incompetent persons whose presence might pose a danger to others satisfies the requirement that the restriction be content neutral and intended to further a

significant state interest. Airport officials have a legitimate interest, indeed a responsibility, to protect persons at airports from mentally ill people. Further, the exclusion of plaintiff from the airport leaves him other avenues of protest, albeit some not as efficacious as the course of action he proposes.

The effect of the restriction the defendants have imposed on plaintiff necessarily results in his complete exclusion from Lambert Field.[4] This does not render the restriction constitutionally invalid. In *City Council v. Taxpayers for Vincent*, the Supreme Court affirmed the constitutionality of a Los Angeles ordinance that prevents political candidates from posting campaign signs on public property. The Supreme Court found this total prohibition permissible, stating "the application of the ordinance in this case responds precisely to the substantive problem which legitimately concerns the City. The ordinance curtails no more speech than is necessary to accomplish its purpose." 104 S.Ct. at 2132. Similarly, a prohibition that prevents mentally incompetent persons from protesting at Lambert Field must necessarily be broad and total in order to accomplish its purpose. The Court finds the defendants' reason for denying the plaintiff's request constitutionally valid, and further holds that Jesse Jamison, due to his severe chronic manic/depressive condition, does not have the right to protest at Lambert Field.

In plaintiff's complaint, though, he seeks not only an injunction ordering defendants to allow him to protest, but a declaration that the process by which Col. Griggs decides who can protest at Lambert Field violates the Constitution. The Court has

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[4] The Court presumes that defendants will not allow plaintiff to enter the terminal for any reason, and plaintiff does not contend that he wants access to the terminal for purposes other than to protest. Consequently, the Court does not consider whether plaintiff has a constitutional right to use the Lambert Field facility for other purposes.

already ruled that Col. Griggs' actions violate the First and Fourteenth Amendments, but that plaintiff, due to his mental affliction, has no right to protest. The issue becomes, then, whether Jamison, a person who does not have the right to protest, can prevail on his application for declaratory relief.

Ordinarily, constitutional standing requirements inherent in the "case" or "controversy" language in the U.S. Const. Art. III §2 preclude persons from asserting the rights of others. 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*: Civil §3531. If these principles apply here, Jamison cannot prevail on his claim that the actions of Col. Griggs violate the Constitution, because he, due to his mental affliction, does not have the right to protest. But, in First Amendment cases the Supreme Court has allowed litigants to raise the rights of others by using the "overbreadth doctrine" to strike down restrictions on speech. *Taxpayers for Vincent,* 104 S.Ct. at 2124-27; *Secretary of State of Maryland v. Joseph H. Munson Co.*, 104 S.Ct. 2839, 2847-50 (1984); and *Broaderick v. Oklahoma,* 413 U.S. 601, 611-13 (1973). Consequently, even though a certain action might not infringe on the rights of a plaintiff who, for whatever reason, has no right to express his views in a given forum, a court can still consider whether that action is overbroad, *i.e.* whether it impermissively [sic] burdens the rights of those who do have the right to speak.

The seminal case in this area is *Broaderick*. There, the Supreme Court, while reaffirming the viability of the overbreadth doctrice, placed limits on its use, noting that the doctrine is "manifestly, strong medicine" and should apply only to substantially overbroad limitations on speech. *Id.* at 611-13. In *Taxpayers for Vincent,* the Court refined the substantially overbroad requirement, stating that "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court for it to be facially challenged on overbreadth grounds." 104 S.Ct. at 2126.

The procedure employed by Col. Griggs on behalf of the City of St. Louis violates one of the best-established principles in the First Amendment area. In fact, in *Broaderick,* the Supreme Court suggests that in situtations where, as here, an official impermissibly exercises boundless discretion in deciding whether persons may speak or protest are especially appropriate occasions for use of the doctrine. 413 U.S. at 613, *citing, Shuttlesworth,* 394 U.S. at 150-51; and *Cox,* 379 U.S. at 557-58. The Court finds that the procedure employed by defendants seriously infringes on the First Amendment rights of those who, unlike plaintiff, have the right absent other considerations to protest at Lambert Field. As a result, although the Court will not order defendants to allow plaintiff to protest, it must declare the procedure by which they determine who may protest unconstitutional in violation of the Free Speech Clause of the First and Fourteenth Amendments to the United States Constitution.

Dated this 17th dy of July, 1986.

Stephen Limbaugh

United States District Judge

APPENDIX

This rule establishes procedures for the exercise of constitutional freedoms and the solicitation of funds at Lambert-St. Louis International Airport, owned and operated by the City of St. Louis.

Rule #01.05

SECTION 1 Any person or organization desiring to engage in activities at Lambert-St. Louis International Airport which involves the exercise of constitutional freedoms, including but not limited to distribution of non-commercial, non-obscene, non-subversive literature, shall be protected in such activities, provided that the same do not constitute commercial activities and do not result in interference with transportation functions of the airport.

SECTION 2 The regulations hereinafter set out are hereby declared to be necessary for the accomplishment of the following purposes:

a. To insure that persons seeking to exercise constitutional freedoms of expression can communicate effectively with users of the airport;

b. To insure adequate nearby police facilities for the protection of persons exercising their constitutional freedoms;

c. To restrict such activities to public areas of the Airport premises;

d. To protect persons using the Airport from repeated communications or encounters which might constitute harassment or intimidation; and

e. To insure the free and orderly flow of pedestrian traffic through the Airport premises.

SECTION 3

a. No person shall solicit alms or contributions of money or of other articles of value, for religious, charitable or any other purpose, or conduct or participate in any speech-making, distributing of pamphlets, books or other written or graphic materials upon the airport or within its facilities without having delivered a written notice to the Director, or [sic] his, her or its intent to do so at least seven (7) days prior thereto so that the precautions to protect the public health, safety and order, and to assure the efficient and orderly use of Airport property for its primary purpose and function, and to assure equal opportunity for the freedom of expression of others.

b. Persons having given such written notice shall be permitted to conduct their activities in or upon the public Airport areas subject to the following restrictions:

1. Solicitors shall be limited to no more than four (4) persons at any one time;

2. Solicitation shall be limited to the hours between 9:00 a.m. and 5:00 p.m.;

3. Solicitations shall be conducted only from "Solicitation Booths" which shall be furnished by the Airport Authority; such booths shall be located within the permissible areas at such points as may be designated from time to time by the Director; and

4. No person, while engaging in the activities provided for herein, shall affix any matter, written or graphic, to any Airport structure or facility, except such as may be necessary to identify the organization which is conducting a solicitation, such signs hereinafter described as to size, content and color.

c. These restrictions are necessary to avoid injury, or the likelihood of injury, to persons or property, or to assure the safe and orderly use of the airport facilities by the public, and such restrictions shall be applied equally and without discrimination as to all persons who have given such written notice. A copy of such restrictions and any explanatory diagrammatic attachments shall be furnished those persons affected.

SECTION 4 In the event that two or more organizations seek to conduct the solicitations described herein at the same time, the Director shall apportion the available areas between or among them an (sic) as equitable a basis as possible.

In no event, however, shall more than two persons be engaged in any activities and solicitations in any one area at the same time. When the Director receives more applications for permits than he is able to grant by following this rule, then he may impose such reasonable and equitable restrictions as to allowable dates or hours or numbers of participants as may reasonably be required to provide fair and as equal as possible opportunities for all applicants, while insuring the efficient and effective operation of the transportation function of the Airport.

SECTION 5 In the solicitation of funds, no sound or voice amplifying apparatus shall be used; and no signs or printed matter shall be attached to the "Soliciation Booths," except as required by this rule to identify the organization which is conducting a solicitation. All groups or organizations receiving permission to solicit shall be required to furnish a sign to identify the organization. The sign shall be as follows:

a. Eight (8) inches high, thirty (30) inches wide;

b. Made of either wood or poster material, neither being over ¼ inch in thickness; and

c. The background of said sign shall be white with letters no larger than six (6) inches in height, said letters being black in color.

SECTION 6 The Director is empowered to wholly or partially restrict the activities provided for herein in the event of emergencies, including but not limited to, strikes affecting the operation of the airport, aircraft or traffic accidents, riots or civil commotion, power failures, or other conditions tending to disrupt the normal operations of the Airport.

SECTION 7 Any violation of a provision of this rule shall constitute a violation and subjects the group or organization to the following:

a. The violator shall be warned that he or she has violated a provision of this rule and what portion was violated;

b. A warning that upon violation of any further provision of this rule, the group or organization shall be asked to leave the premises; and

c. Failure to leave shall subject them to arrest as a Trespasser.

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No. 87-943

In The
Supreme Court of the United States
October Term, 1987

CITY OF ST. LOUIS,

Petitioner,

vs.

JESSE WOODSON JAMISON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SCHWARTZ, HERMAN & DAVIDSON

*ROBERT HERMAN
MILTON L. SCHWARTZ
1221 Locust, Suite 750
St. Louis, MO 63103
(314) 231-0600
Attorney for Respondent Jamison

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Reasons for Denying the Writ	1
I. The Solicitation Rule Adopted By The City of St. Louis Recognizes the Public Forum Status of Unrestricted Areas of the Airport.	1
II. Airport Director Griggs Exercised Complete and Unguided Discretion In Denying Plaintiff-Respondent's Application to Exercise His First Amendment Rights at the Airport.	2
III. Airport Director Griggs' Attempt to Bar All Persons Who Have A History of Mental Illness From the Airport Is Not A Reasonable Time, Place or Manner Regulation Because It Is Not Content Neutral, Is Overbroad and Overinclusive and Violates Equal Protection of the Laws.	4
Conclusion	5

TABLE OF AUTHORITIES

Page

CASES

Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc., 482 U.S. —, 107 S.Ct. 2668 (1987) 3, 4

Grayned v. City of Rockford, 408 U.S. 104 (1972) 2

Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983) 4

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 5

REASONS FOR DENYING THE WRIT

This Court should deny this Petition for Writ of Certiorari because this case does not present any questions of general importance which should be considered by this Court. The issues presented to the District Court and to the Eighth Circuit in this case are whether the unrestricted areas in the Lambert-St. Louis International Airport are a public forum available for the expression of first amendment rights and whether Plaintiff-Respondent Jamison's request to silently protest was unconstitutionally denied. This issue was effectively decided in Plaintiff-Respondent's favor by the City's adoption of an airport "Solicitation Rule" which designated unrestricted areas of the airport as being held open for first amendment expression. In ruling for the Plaintiff-Respondent, the Eighth Circuit followed precedents established by this Court and held that the unrestricted areas of the airport had been established by the City as a public forum and that the denial of Jamison's request was unconstitutional.

I. The Solicitation Rule Adopted By The City of St. Louis Recognizes the Public Forum Status of Unrestricted Areas of the Airport.

In determining that unrestricted areas of the Lambert-St. Louis International Airport constitute a public forum, the Eighth Circuit cited the Airport's Solicitation Rule, Section 1.05, which states that "any person or organization desiring to engage in activities at Lambert-St. Louis International Airport which involves the exercise of constitutional freedoms . . . shall be protected in such activities. . . ." Appendix, A-25. The rule's stated intent is to "insure that persons seeking to exercise constitutional

freedoms of expression can communicate effectively with users of the Airport." Appendix, A-25.

The Eighth Circuit concluded that the "City's regulations thus implicitly acknowledge that the first amendment activities that take place in more traditional public forums are not incompatible with the purposes of an airport's public concourses." Cf. *Grayned v. City of Rockford,* 408 U.S. 104, 116 (1972). Appendix, A-6. ("crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place ....")

The Eighth Circuit followed a long line of cases both from the state and federal levels which have unanimously held that an airport is a public forum in which first amendment activities are protected. Appendix, A-6. However, rather than blindly following precedent, the Court relied heavily upon the City's "implicit acknowledgment that the concourse of a large airport facility like the one in St. Louis has the character, pattern of activity, and nature of purpose that makes it an appropriate place for the communication of views." Appendix, A-7.

II. Airport Director Griggs Exercised Complete and Unguided Discretion In Denying Plaintiff-Respondent's Application to Exercise His First Amendment Rights at the Airport.

In light of the public character of the concourses of Lambert-St. Louis International Airport and Solicitation Rule 1.05, which acknowledges the Airport's public forum status, the complete and unguided discretion exercised by the Airport Director in denying Plaintiff-Respondent's application to protest is inconsistent with the preservation

of first amendment rights. Defendants have asserted that Airport Director Griggs' previous refusals to obey the procedures established under Rule 1.05 somehow caused the Rule to be "moribund" at the time of Jamison's request to exercise his first amendment rights. Upon the asserted nullification of the Rule, Defendants argue that Director Griggs acquired general discretion to disallow any activities that, in his opinion, would not be in the best interests of the airport or persons using it. This practice resulted in the denial of all requests for permission to protest or solicit except those mandated by court order.

The Eighth Circuit rejected such practice which:

> makes the peaceful enjoyment of freedom which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship of prior restraint upon the enjoyment of those freedoms.

Appendix, A-8.

In *Board of Commissioners v. Jews for Jesus,* 107 S.Ct. 2568 (1987), decided last term, this Court rejected an airport regulation which purported to prohibit all "non-airport related" speech on the grounds that such regulation would give airport officials the unconstitutional power "to decide in the first instance whether a given act is airport related." *Jews for Jesus, supra,* 107 S.Ct. 2568 at 2573. The exercise of broad discretion by Airport Director Griggs in this case would likewise cause "immeasurable injury" towards Plaintiff-Respondent and all persons who wished to exercise their first amendment freedoms at the airport.

Finally, the Eighth Circuit held that the City's practices were not narrowly tailored to serve compelling governmental purposes. Director Griggs testified that he routinely refused all requests to protest or solicit except those mandated by court order. A rule banning all first amendment activity is clearly overbroad and unconstitutional. *Jews for Jesus, supra,* 107 S.Ct. at 2571.

III. Airport Director Griggs' Attempt to Bar All Persons Who Have A History of Mental Illness From the Airport Is Not A Reasonable Time, Place or Manner Regulation Because It Is Not Content Neutral, Is Overbroad and Overinclusive and Violates Equal Protection of the Laws.

The Eighth Circuit held that the City of St. Louis and its Airport Director failed to demonstrate that a broad exclusion of all persons suffering from some form of mental illness would further the City's interest in security and operational efficiency. Appendix, A-10. In determining that the government may regulate the time, place and manner of expression in public forums, the Eighth Circuit turned to the well-established maxim that such regulations must be "content neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Education Ass'n, supra,* 460 U.S. at 45. Appendix, A-9.

The Eighth Circuit rejected the City's argument that persons, including Jamison, who have mental illnesses "which increase their propensity for violent or disruptive conduct," can be uniformly deprived of their first amendment rights as being an "overbroad and constitutionally offensive prohibition." Appendix, A-10. After deter-

mining that the evidence did not demonstrate that Jamison, himself, would in fact pose a danger to the public, the Eighth Circuit found support in this Court's language from *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508 (1969): "[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Appendix, A-10.

CONCLUSION

For the foregoing reasons, this case does not present any question of general importance which should be considered by this Court, nor does the Eighth Circuit opinion in *Jamison v. City of St. Louis* conflict with holdings among other circuits, and the Petition for a Writ of Certiorari to review the judgment and opinion of the Eighth Circuit should be denied.

Respectfully submitted,

SCHWARTZ, HERMAN & DAVIDSON

ROBERT HERMAN
1221 Locust, Suite 750
St. Louis, MO 63103
(314) 231-0600

This brief was prepared with the assistance of William J. Balmer.